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No. _____

Supreme Court, U.S.
FILED

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IN THE

SUPREME COURT OF THE UNITED STATES

DAVID GEORGE CHANDLER,

Petitioner

v.

SHARON BLACKETTER,

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
for the
Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Whether a criminal defendant's Sixth Amendment right to counsel may be forfeited by conduct.

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II. OPINIONS BELOW

The United States District Court for the District of Oregon denied Mr. Chandler's petition for writ of habeas corpus. (Appendices A, B & C.) The Ninth Circuit Court of Appeals affirmed. (Appendices D & E.)

III. JURISDICTIONAL BASIS

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

V. STATEMENT OF THE CASE

A. Pre-Trial And Trial-Level Proceedings

In October, 2001, the state indicted David Chandler ("Chandler") on charges of rape in the second degree, two counts of sodomy in the second degree, furnishing alcohol to a minor, and two counts of endangering the welfare of a minor. (ER 143–45.)[1] Chandler pleaded not guilty, and the court eventually appointed William Shepley ("Shepley") to represent Chandler. Overall, Chandler was "perfectly happy" with Shepley's representation. (ER 119.) At one point, however, Shepley decided to withdraw. Evidently, Chandler wished to take the stand to testify in his own defense, but Shepley did not want to take that strategy. *Id.* At the hearing on Shepley's motion to withdraw, Chandler commented that "it's his decision. I have no problem with him." (ER 140.) The trial court granted the motion and appointed Daniel Woram ("Woram") to represent Chandler.

Thereafter, Chandler asked for new counsel. (ER 137.) The court held a hearing on Chandler's request for substitute counsel. At the hearing, Chandler explained that, among other things, Woram had refused to cooperate with Chandler in preparing a defense. (ER 137.) Chandler explained that Woram had refused to set a bail reduction hearing, refused to address Chandler's questions,

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[1] "ER" refers to the Excerpt of Record in the Ninth Circuit case.

and – after calling Chandler "a fuck" – took the attitude of "this whole thing was an entire burden to him." (ER 120.) The court declined to appoint new counsel, and ordered Woram to continue to represent Chandler. (ER 62.)

Shortly thereafter, Woram filed a motion to withdraw. At the hearing on the matter, Woram represented to the court that he could not ethically continue as Chandler's attorney. The court allowed Woram's withdrawal and appointed Mr. Watson ("Watson") to represent Chandler. (ER 62.)

Watson later moved to withdraw, and the court held a hearing on the matter. At that hearing, the court asked Chandler whether he wanted the court to replace Watson. Chandler responded that he did and that he believed the feeling was mutual. (ER 135.) Chandler subsequently discussed Watson's dismissive attitude, noting that when Chandler first met Watson, Watson "didn't even say hello. He didn't look [Chandler] in the eye; he didn't introduce himself. He threw his business card at [Chandler]. That was his attitude . . . ." (ER 120.) The court granted the motion and told Chandler that "this is the end of the line with regard to changing attorneys." (ER 135.) The court then appointed Mr. Bernstein ("Bernstein").

Bernstein later moved to withdraw. At the hearing on that matter, Bernstein said that he had "no intention" of continuing to represent Chandler. (ER 132.) Chandler advised the court that Bernstein

"did an incompetent job at one of my hearings. I criticized him for it, and he quit in a huff." (ER 130.) After the trial court stated that Chandler couldn't "get along" with his attorneys, Chandler noted that he did not ask Bernstein to quit, but "merely criticized him. I had no intention of this happening. This is his doing, not mine, Your Honor." (ER 132.)

The trial court initially denied Bernstein's motion to withdraw, but then took the motion under advisement after Bernstein refused to continue as Chandler's counsel. *Id.*

At a second hearing on the withdrawal issue, the court granted Bernstein's motion to withdraw, in part because of a rude letter that Chandler sent to Bernstein. (ER 60.) The judge explained to Chandler that the judge had decided that it was "fruitless to try to appoint another attorney to represent [him]." (ER 64.) The judge said that he would try to get another attorney to act as a legal advisor for Chandler. *Id.*

At the second hearing, Chandler explained to the court that he did not want Bernstein to withdraw. Chandler was happy that Bernstein had been appointed and was generally pleased with Bernstein's performance, although he had criticized Bernstein's performance at one hearing (ER 118–19, 120.) Chandler had never intended his critique of Bernstein to lead to Bernstein's request to withdraw. *Id.* Chandler "had no idea that that would be the result." (ER 118.) Chandler explained that he was

very upset at Bernstein's request to withdraw when he wrote the disrespectful letter to Bernstein, and he apologized for the letter. (ER 120.)

Chandler asked the court to appoint another attorney, Jenny Cooke ("Cooke"), who was in the courtroom at the judge's invitation. (ER 121.) Chandler promised that, if Cooke were appointed, he would "bend over backwards" to ensure that the attorney-client relationship stayed intact. (ER 120–21.) Chandler stated that he was "in no way competent to represent [himself] in trial." (ER 121.)

The trial court confirmed that no substitute counsel would be appointed. (ER 65–66.) The court suggested that it would try to find an attorney to act as a legal advisor for Chandler. (ER 66.) Chandler objected. *Id.*

Subsequently, the court addressed the matter of appointing an attorney to act as a legal advisor to Chandler. Chandler told the court, "I'm not representing myself so I don't need a legal advisor." (ER 114.) Chandler's feeling was that the court was trying to "bait" him into accepting the legal advisor, versus true legal counsel, arrangement. (ER 115.) The court did not appoint a legal advisor.

The day of trial, Cooke appeared on Chandler's behalf. Cooke only represented Chandler for the purpose of arguing a motion seeking appointment of trial counsel. (ER 94.) In discussing the history of

the case, Cooke explained, *inter alia*, that Shepley had moved to withdraw, but the motion to withdraw did not show that Chandler had been uncooperative. (ER 95.) Also, Woram, in moving to withdraw, had not suggested that Chandler had been uncooperative. (ER 95–96.) Neither, Cooke argued, had Watson. (ER 96.)

Cooke argued that getting along with one's lawyer is not a prerequisite to competent representation. (ER 96.) Cooke further noted that criminal defendants are often critical of their attorneys. *Id.* Cook argued that Chandler's letter to Bernstein had been privileged and that Bernstein should not have provided it to the court. (ER 98–99.)

Cooke discussed the arguments made in the motions filed by prior counsel. She concluded:

> I think that where what you have is an indigent client who has requested court-appointed counsel, where there's no showing on – you know, in any of the court documents that he was uncooperative with his lawyers. Again, as you know, he's facing a huge amount of time. He's frightened. He's probably not the easiest person in the world to deal with, and I agree that that's probably an understatement.
>
> But again, I really feel that, from my experience, that's not at all unusual in

> these sorts of cases. I just don't think that the Court can – I do – I do not think that the constitutions of either the State of Oregon or the United States permit this Court to force Mr. Chandler to proceed to trial without counsel.

(ER 101.)

The court denied the motion for appointed counsel. (ER 148-49.) The court suggested that Chandler was trying to delay the proceedings and the court mentioned the previous advisement that Bernstein would be Chandler's last court-appointed attorney. *Id.* The court stated, "[Chandler's] going to be trying this case. We're going to go to trial, and if the Court of Appeals wants to send it back, we'll do it over again some day." (ER 149.)

Trial began. At the beginning of the trial, Chandler clearly communicated his position on proceeding without counsel:

> I have not waived my right to a court-appointed counsel. I'm not competent to represent myself. And I have been more than willing to waive my fast and speedy [trial rights] again, and this whole thing's pointless. I'm not going to participate in any way.
>
> THE COURT: All right. Well you have a right to participate, and if it's your

> voluntary decision to choose not to do that, that'll – that's going to be up to you.
>
> DEFENDANT: It's not voluntary. It's that I'm not competent to do it.
>
> THE COURT: All right. Well, you've put yourself in this position –
>
> DEFENDANT: No, I haven't.
>
> THE COURT: – regrettably –

(ER 104.)

The jury trial proceeded with Chandler representing himself, over his objection. After the state's opening statement, when the court asked Chandler if he wished to make an opening statement, Chandler replied, "I'm not capable of making an opening statement, and I wish to be represented by counsel." (ER 56.) The court then advised the jury that

> the Court's determined, as a matter of law, that Mr. Chandler has waived his right to further court-appointed counsel in this case. So when you hear him say that, as a matter of law, as I said, the Court has made that determination.

(ER 56.)

Throughout the trial, Chandler repeatedly asked for appointed counsel. When the court asked Chandler if he wished to cross-examine witnesses, Chandler stated, "I'm not capable of cross-examining witnesses and wish to be represented by counsel" (ER 90), "I'm incapable of cross-examining witnesses, and I wish to be represented by counsel" (ER 105–6), "I'm not capable of cross-examining witnesses and I wish to be represented by counsel" (ER 107), "I'm not competent to represent myself, and I wish to be represented by counsel" (ER 109), and "I request to be represented by counsel" (ER 110.) When asked if he objected to evidence, Chandler stated, "I am not competent to represent myself. I wish to be represented by counsel." (ER 108.)

When the state rested its case, the trial court, out of the presence of the jury, asked Chandler if he wished to testify or put on evidence. (ER 49–50.) Chandler responded, "I'm not capable of representing myself. I wish to be represented by counsel." (ER 50.) The trial court then stated that Chandler had waived his right to testify as a matter of law. *Id.*

During discussion of jury instructions, the court asked if there were any jury instructions that Chandler wished to give to the jury. (ER 91.) Chandler responded, "I'm not competent to participate in this. I request counsel." *Id.*

After the state's closing argument, when the trial court asked Chandler if he wished to make a closing argument, Chandler replied, "I'm not capable of participating in this and wish to request counsel. I have not waived that right." (ER 51.) The trial court responded that as a matter of law Chandler had waived that right. (ER 51-52.)

After the court instructed the jury, the trial court asked Chandler if he had exceptions to the instructions, and Chandler responded, "I'm not capable of participating in this and wish to be represented by counsel." (ER 92.)

The jury returned guilty verdicts on all counts. (ER 71.)

At a subsequent hearing, the court ruled that it was not required to appoint counsel for Chandler for sentencing. The court stated:

> Well, . . . I'm satisfied that, based on Judge Selander's ruling and my prior ruling in this case that, based on Mr. Chandler's inability to work with his numerous other court-appointed attorneys that, this being part of the same proceeding, that there's no obligation on behalf of the State to appoint an attorney at this juncture.

> So the previous ruling is going to stand, and we're going to continue as previously ordered.

(ER 47.)

On February 7, 2003, the matter proceeded to sentencing. (ER 79–88.) Chandler was not represented by counsel at sentencing, and Chandler made only a brief statement during the sentencing hearing. (ER 84.) The court imposed consecutive sentences for the three most serious crimes, for a total sentence of 225 months in prison. (ER 85–87.)

B. Subsequent State-Court Proceedings

Chandler appealed to the Oregon Court of Appeals. His brief assigned error to the trial court's failure to appoint counsel for the trial and for sentencing. Chandler argued that he was denied his Sixth Amendment right to counsel. Chandler further argued that he had not waived his right to counsel under the Oregon or United States Constitutions. The Oregon Court of Appeals affirmed without opinion. (ER 44–45); *State v. Chandler*, 205 Or. App. 568, 135 P.3d 859 (2006.)

Petitioner sought review by the Oregon Supreme Court, repeating his argument that, *inter alia*, his Sixth Amendment right to counsel had been violated. The Oregon Supreme Court denied review. (ER–43); *State v. Chandler*, 341 Or. 245, 142 P.3d 73 (2006.)

Petitioner did not seek post-conviction relief in state court.

C. Federal Habeas Corpus Proceedings

Chandler filed a petition for writ of habeas corpus in federal court in 2006. He asserted that the trial court's refusal to appoint counsel for trial and sentencing denied Chandler his Sixth Amendment right to counsel.

The Magistrate Judge's Findings and Recommendation concluded, in essence, that a criminal defendant may forfeit the right to counsel through conduct if the defendant is aware of the risks of self-representation. (Appendix A.) The Magistrate Judge found that Chandler was aware of the risks of self-representation and, through his actions, had waived his right to counsel. *Id.*

Chandler's counsel filed objections to the Magistrate Judge's Findings and Recommendations. The District Court adopted the Findings and Recommendation and denied Chandler's petition. (Appendices B & C.)

The Ninth Circuit affirmed. The panel issued a Memorandum suggesting that a criminal defendant's Sixth Amendment right to counsel may be forfeited through misconduct. (Appendix D.) The Ninth Circuit denied a subsequent petition for rehearing. (Appendix E.)

VI. REASONS FOR GRANTING THE WRIT

A. Introduction

This case strikes at the very core of the Sixth Amendment right to counsel and the noble legacy of *Gideon v. Wainwright*, 372 U.S. 335 (1963), which stands as a constant admonition that if the safeguards provided by the Sixth Amendment are denied, justice cannot be done.

While this Court's precedent allows for the waiver of the right to counsel, Chandler did not waive this fundamental right. Chandler requested the guiding hand of counsel at every opportunity and he did not request the withdrawal of his last court-appointed attorney. The state court judge never informed Chandler of the risks of self-representation, thus depriving Chandler of the opportunity to knowingly and intelligently waive his right to counsel. Furthermore, even if forfeiture were a basis to deny the right to counsel, Chandler's behavior was insufficient to trigger such an extreme outcome.

The Ninth Circuit decision conflicts with decisions of this Court and of other United States Courts of Appeal. Furthermore, the Ninth Circuit's decision decides an important question of federal law that has not been, but should be, settled by this Court.

B. Chandler's Conviction And Sentence Were Obtained In Violation Of The United States Constitution Because Chandler Neither Waived Nor Forfeited His Sixth Amendment Right To Counsel.

1. The Right To Counsel

The Sixth Amendment to the United States Constitution provides, in part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The Sixth Amendment is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. at 342–45. A "criminal prosecution," for purposes of the Sixth Amendment right to counsel, is a criminal prosecution in which a term of incarceration is imposed. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

This Court has proclaimed that the right to counsel is "fundamental." *See, e.g., Gideon*, 372 U.S. at 342–45. Assistance of counsel must be made available at critical stages of a criminal prosecution, *United States v. Wade*, 388 U.S. 218, 223–27 (1967), whether or not the defendant has requested it. *Carnley v. Cochran*, 369 U.S. 506, 513 (1962). Critical stages of the criminal process include both trial and sentencing. *See Gardner v. Florida*, 430 U.S. 349, 358 (1977).

2. Chandler Did Not Waive His Right to Counsel

a. A Valid Waiver Of The Sixth Amendment Right To Counsel Must Be Deliberate And Unambiguous, And Knowing And Intelligent

Under certain circumstances, one may waive his/her right to counsel. *Faretta v. California*, 422 U.S. 806 (1975). A waiver is an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). A waiver of the right to counsel must be knowing and intelligent. *Faretta*, 422 U.S. at 835. Courts must indulge in every reasonable presumption against waiver of the right to counsel. *Brewer v. Williams*, 430 U.S. 387, 404 (1977).

At the time of the last reasoned state-court decision in this case, a valid waiver of counsel had two components. First, the defendant must have indicated to the court a desire to waive counsel. *See, e.g., Johnson* 304 U.S. at 464. Second, a defendant must have at least been "made aware of the dangers and disadvantages of self-representation, so that the record [would] establish that 'he [knew] what he [was] doing and his choice [was] made with eyes open.'" *Faretta*, 422 U.S. at 835 (quoting *Adams v.*

United States ex rel. McCann, 317 U.S. 269, 279 (1942).[2]

b. Chandler Did Not Intend To Waive His Right To Counsel

Far from indicating a desire to waive counsel, Chandler adamantly maintained that he needed and wanted the assistance of counsel. Chandler's requests for representation pepper the transcript. He felt incompetent to represent himself and he wanted the guiding hand of counsel at trial and sentencing. He mentioned this on numerous occasions.

It is important to note that Chandler did not "fire" Bernstein, his last attorney, or ask the court to replace him. At the first hearing on the withdrawal issue, Chandler noted that he did not ask Bernstein to quit, but "merely criticized him . . . This is his doing, not mine, Your Honor." (ER 132.) The trial court initially denied Bernstein's motion to withdraw, but then took the motion under advisement after Bernstein refused to continue as Chandler's counsel. At the second hearing on the withdrawal issue, the court granted Bernstein's

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[2] Since the last-reasoned state-court decision in this case, this Court decided *Iowa v. Tovar*, 541 U.S. 77 (2004), which held that, in order to accept an un-counseled guilty plea, the trial court must inform the defendant of the "nature of the charge against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea." *Id.* at 80.

motion to withdraw, in part because of the boorish letter that Chandler sent to Bernstein. Addressing the court, Chandler explained that he did not want Bernstein to withdraw. Chandler was happy that Bernstein had been appointed and was generally pleased with Bernstein's performance. Chandler had never intended his critique of Bernstein to lead to Bernstein's request to withdraw. Chandler "had no idea that that would be the result." (ER 118.) Chandler explained that he was very upset at Bernstein's request to withdraw when he wrote the disrespectful letter to Bernstein, and he apologized for the letter. Chandler did not intend for the court to remove Bernstein, and Chandler certainly did not intentionally or deliberately waive the right to have an attorney represent him.

c. The Record Does Not Show That Chandler Made A Knowing, Voluntary Choice With His Eyes Open.

The record does not show that Chandler was aware of the risks of self-representation or that he made a knowing, voluntary decision to waive his right to counsel.

Faretta held that a waiver of counsel is valid when the record establishes that a defendant is made aware of the dangers and disadvantages of self-representation, "so that . . . that 'he knows what he is doing and his choice is made with eyes open.'"

Faretta, 422 U.S. at 835 (*quoting Adams*, 317 U.S. at 279).

In this case, the Ninth Circuit failed to address this crucial issue in its Memorandum. (Appendix D.) However, the District Court properly noted that the preferred procedure for ensuring that the *Faretta* standard is satisfied involves the trial court engaging in a colloquy with the defendant to confirm that the defendant understands the nature of the charges, the possible penalties, and the dangers and disadvantages of self representation. (Appendix B.) The District Court also correctly pointed out that no such colloquy occurred in this case. *Id.* However, the District Court wrongly found that Chandler understood the dangers and disadvantages of self-representation despite the trial court's failure to instruct Chandler or to perform a meaningful inquiry. (Appendices A & B.) The District Court based its determination in large part on the following: 1) Chandler's comment that he was "in no way competent" to represent himself; 2) Chandler's statement that the court "railroaded [him] into a conviction" by denying his request for replacement counsel; and 3) the trial court's comment that Chandler "seem[ed] to communicate very well," indicating, to the District Court at least, that Chandler had the intellectual capacity to understand the risks of proceeding *pro se*. (Appendix A.) However, Chandler's comments, and the record as a whole, do not support the conclusion that Chandler was aware of the dangers of proceeding without counsel or that Chandler made a voluntary choice

with his eyes open. The District Court read too much into Chandler's ambiguous and broad statements and the court conflated the (assumed) ability to understand with actual understanding. The record only shows that Chandler wanted a lawyer because he did not think that he was competent to represent himself. And this Court agrees with Chandler. This Court has stated that, generally, a lay person is not competent to represent him/herself. *See Patterson v. Illinois*, 487 U.S. 285, 299 n.13 (1988) ("[C]ounsel is required to help even the most gifted layman adhere to the rules of procedure and evidence, comprehend the subtleties of *voir dire*, examine and cross examine witnesses effectively . . . , object to improper prosecution questions, and much more."). Furthermore, there is no evidence that Chandler was made aware of the nature of the charges against him or the possible penalties.

In sum, the record fails to show that Chandler was aware, or was made aware, of the dangers and disadvantages of self-representation or that he made a knowing and intelligent waiver of his right to counsel.

3. Chandler Did Not Forfeit His Right to Counsel

a. Forfeiture-By-Conduct Is Contrary To This Court's Precedent

This Court has consistently held that the right to counsel is a fundamental right that can only be waived knowingly, intelligently, and voluntarily. A summary decision that a defendant has forfeited his/her right to counsel cannot be reconciled with this Court's cases such as *Faretta* and *Brewer*, *supra*.[3] The Sixth Amendment imposes a higher burden on a trial court before the trial court refuses a criminal defendant the guiding hand of counsel. Before counsel is denied, the trial court must ensure that a criminal defendant knows the risks involved with proceeding without counsel, knows what he is doing, and makes his choice with his "eyes open." *Faretta*, 422 U.S. at 835. The court must indulge in every reasonable presumption against a waiver of counsel and should not presume acquiescence in the loss of the fundamental right. *Johnson*, 304 U.S. at 464. In short, the Sixth Amendment requires the trial court to take certain careful precautions to ensure a valid waiver. The court may not summarily – or without providing to a criminal defendant meaningful, representation-related information – deny counsel based solely on a defendant's conduct.

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[3] And, since 2004, *Tovar*, *supra*.

b. Even If Forfeiture-By-Conduct Were Constitutional, Chandler's Conduct Was Not So Egregious As To Constitute A Forfeiture Of His Right To Counsel

As noted above, this Court has never approved of the forfeiture (as distinct from waiver) of the right to counsel. However, this Court held in *Illinois v. Allen*, 397 U.S. 337 (1970) and *Taylor v. United States*, 414 U.S. 17 (1973), that a defendant could forfeit the right to be present at his/her own trial due to misconduct. The Second Circuit, in a habeas corpus case, interpreted *Allen* and *Taylor* to allow a defendant's forfeiture of the right to counsel. *Gilchrist v. O'Keefe*, 260 F.3d 87, 96–97 (2nd Cir. 2001) (generally, "extremely serious misconduct," such as physically assaulting counsel, can be treated as a forfeiture of the right to counsel). Other Circuits have observed that some kinds of misconduct by a criminal defendant can be treated as forfeiture, rather than waiver, of the right to counsel. *See, e.g., United States v. Goldberg*, 67 F.3d 1092, 1099–101 (3rd Cir. 1995) (comparing waiver and forfeiture).

The Ninth Circuit has not used the term "forfeiture" in the context of the right to counsel. It has, however, held that, under some circumstances, a criminal defendant can waive counsel by engaging in game-playing in responding to the court's questions about waiver of counsel. *United States v. Kelm*, 827 F.2d 1319, 1322 (1987).

In *Kelm*, the district court held, and the Ninth Circuit agreed, that Kelm's continued refusal either to retain counsel or to accept appointed counsel constituted a waiver of the right to counsel. The defendant controlled whether he had counsel, and the district court found that he chose not to retain counsel in order to frustrate the judicial process. *Id.* at 1322. The court summarized Kelm's conduct as follows:

> There is little doubt that Kelm's conduct hindered the 'efficient administration of justice.' Kelm failed to appear at hearings dealing with his right to counsel.
>
> Trial was continued three times in order to allow him to find 'suitable counsel.' Kelm's requirement that prospective counsel complete a detailed letter questionnaire and that they be experienced tax trial lawyers was correctly found by the trial court to have 'deterred and hindered counsel selection.' In light of Kelm's persistent refusal to accept an appointed attorney, to hire his own attorney, or to expressly waive his right to an attorney, the district court's decision not to grant further continuances was 'fair and reasonable.'

Id.

Accordingly, on the facts of that case, the Ninth Circuit found that Kelm had waived the right to counsel.

However, Chandler's actions in the instant case are not comparable to Kelm's. Chandler never deliberately appeared without counsel, and the record does not show that Chandler engaged in misconduct with any of his attorneys. Rather, Chandler sought new counsel when his prior attorneys moved to withdraw – and, some of Chandler's attorneys apparently withdrew on their own volition. Notably, Chandler did not want his final attorney, Bernstein, to withdraw. Chandler was mostly pleased with Bernstein's representation and was very upset that Bernstein moved to withdraw. The record is insufficient to show that Chandler's problems were entirely of his own making.

United States v. Meeks, 987 F.2d 575 (9th Cir. 1993) is also instructive. In *Meeks*, the defendant hired counsel after the court had appointed counsel. Then, defendant fired his retained counsel and asked for new appointed counsel. The court attempted to appoint one attorney, who refused the case, and appointed another, who moved to withdraw after his first meeting with the defendant. The court granted the motion to withdraw and declined to appoint new counsel. *Id.* at 577.

The Ninth Circuit held that the defendant's right to counsel had been violated, and ordered a

new trial. The court observed that, when Meeks had repeatedly sought substitute counsel, the

> court had several options. It could have (1) denied both Meeks' and [court-appointed counsel's] motions leaving [counsel] as Meek's attorney, (2) granted both motions and appointed [another attorney] or (3) given Meeks the opportunity to knowingly and intelligently waive his right to counsel and to proceed *pro se*. The court erred in employing none of these options.

Id. at 579.

This case resembles *Meeks* more than it does *Kelm*. In this case, as in *Meeks*, Chandler had court-appointed counsel, and the court was in control of whether Chandler's counsel continued to represent him. *See Meeks*, 987 F.2d at 579 (noting the importance of that fact, contrasting with *Kelm*). Also, as in *Meeks*, counsel moved to withdraw and was not discharged by Chandler. In sum, the facts and the trial court's options were similar to those in *Meeks* and the collateral-attack result should be the same.

Finally, if this Court were to adopt an express "forfeiture" basis to deny the right to counsel, the bar must be set high for forfeiture-triggering acts in order to safeguard the guarantees of the Sixth Amendment and to mesh with the rules outlined in

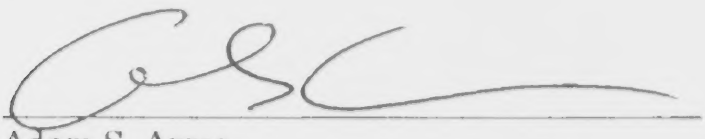
this Court's waiver cases. Only extremely serious misconduct committed after specific, appropriate warnings and guidance should trigger forfeiture. Here, Chandler's behavior was insufficient for such a drastic outcome. Surely, Chandler's conduct in sending the rude letter to Bernstein was impolite and boorish, but just as surely it was not extremely serious misconduct that justified erasure of the fundamental right to assistance of counsel in what was a very serious criminal case. To the extent that the Ninth Circuit's decision here utilized a very low standard for forfeiture, it conflicts with the above-mentioned precedent set by this Court and other federal Circuit Courts of Appeal.

In summary, even if forfeiture-by-conduct were allowed, Chandler's actions did not rise to the level of triggering forfeiture – especially given the options available to the trial court, such as disallowing the motion to withdraw, appointing substitute counsel, and providing Chandler with the opportunity to validly waive his right to counsel.

VII. CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari.

Respectfully submitted this 2nd day of July, 2010.



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